Supreme Court, U.S.
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No. 95-2074

In the
Supreme Court of the United States
October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, Archbishop of San Antonio,

Respondent,

and

THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION AND BRIEF *AMICI CURIAE* OF CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., AND AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF PETITIONER

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MOTION OF *AMICI CURIAE* CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC. AND AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN TO FILE BRIEF IN SUPPORT OF PETITIONER

The above organizations hereby respectfully move this honorable Court for an Order permitting them to file an *amici curiae* brief in the above captioned matter. All parties have consented.

The above organizations' interest in this case is sincere. Their purpose is to protect the lives, health, and rights of children. To that end, these amici have identified infirmities in the Religious Freedom Restoration Act, 42 U.S.C. 2000bb1-4 ("RFRA"), which have the effect of subjugating the constitutional rights of non-religious persons, which has a disproportional effect on children.

For these reasons, the above organizations respectfully request this Court to issue an Order allowing them to file the attached *amici curiae* brief in this case.

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STATEMENT OF INTEREST

Founded in 1983, Children's Healthcare is a Legal Duty, Inc. ("CHILD, Inc.") is a private tax-exempt organization with about 300 members in 44 states. CHILD, Inc. promotes the rights of children to medical care and opposes religious exemptions from health care requirements for children and from statutory duties of care.

The American Professional Society on the Abuse of Children ("APSAC") is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy. The purposes of APSAC are to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals, to increase knowledge about abuse, and to improve the competence of professionals working with abused children and their families. APSAC was founded in 1987, and now has more than 5,000 members.

The interests of the amici curiae in this case arise from the indisputable fact that children are dependent on adults for the essentials of life -- including decisions about when it is appropriate to seek medical care. The amici do not contest this pivotal decision-making role for the child's family. Nor do the amici seek a legal rule in which parents' difficult decisions concerning children would be subject to second guessing by authorities whenever an outcome is undesirable. However, when adults' actions expose a child to serious physical harm or suffering and death, the adults' actions must be subject to the full range of legal remedies that would be available to any adult in the child's position. Such remedies are essential to safeguard children against the actions of individuals that manifest a willful disregard for the safety and health of children.

ARGUMENT

I. CONGRESS HAS EXCEEDED ITS POWERS UNDER ARTICLE 5 OF THE FOURTEENTH AMENDMENT BECAUSE RFRA RATCHETS DOWN DUE PROCESS AND EQUAL PROTECTION RIGHTS.

Respondent has asserted that Section 5 of the Fourteenth Amendment authorizes Congress to "expand but not contract the scope of Fourteenth Amendment liberties" (Respondent Flores' Response to Petition, at 25) under *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the so-called one-way ratchet theory. Respondent thus concedes that if the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 et seq., ("RFRA"), has the effect of violating or subjugating constitutional rights, then Congress has exceeded its authority under Article 5. Amici will show that RFRA is not a one-way ratchet at all, but rather a two-way ratchet which denies due process and equal protection of the laws to everyone who interacts with a person or religious entity who may assert the RFRA preference. In this respect, children are particularly adversely affected.

RFRA applies a strict scrutiny standard to the actions of all levels of government. 42 U.S.C. § 2000bb-1, et seq. At first glance, it may appear that only the interests or rights of government are subject to the broad sweep of RFRA. On closer examination, however, it is readily apparent that other private interests and rights, including those of children in the custody or care of religiously motivated parents or guardians, are also subjected to strict scrutiny.

In *New York Times v. Sullivan*, 376 U.S. 255 (1964) the Court held that the rules of law applied in civil actions between private parties are government action for purposes of constitutional scrutiny. Because RFRA prohibits government

from substantially burdening an exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), RFRA requires strict scrutiny to be applied in all court actions where one of the parties alleges a burden on the exercise of religion. The result is that religious standards will be applied by the courts in such cases, and an impossibly high burden of proof will be imposed on the non-religious party.

For example, in a hypothetical boundary line dispute between a church and an adjoining landowner, certainly a state court judgment decreeing that the true boundary between the properties impinged significantly on church property would be a substantial burden under RFRA. Compelling government interests are interests of the highest order, such as "national security or public safety." *In re Young*, 82 F.3d 1407, 1419 (8th Cir. 1996), *pet. for cert. filed.* The government interest in its application of neutral principles law or providing a forum for a suit between two private parties is probably not a governmental interest of the highest order and therefore not a compelling interest. The result under RFRA is that the church would be entitled to take as much of the disputed property from the adjoining landowner as is sufficient to avoid a substantial burden on it. RFRA thus destroys the adjoining landowner's Fourteenth Amendment right to his property and his right to have the dispute adjudicated under neutral principles of law in violation of due process and equal protection.

The unqualified preference for religion granted by RFRA, even in cases where the conflicting interests are not between government and religion but rather between religion and other private interests, is present in *Young, id.* In *Young,* the bankruptcy trustee administering the bankruptcy estate for the benefit of all creditors under Bankruptcy Code provisions neutral toward religion, was prohibited from recovering preferential payments made by the bankrupt to his church on

the eve of bankruptcy. The court applied RFRA and held that the recovery of the preferential payment was a substantial burden on the church and the government had no compelling interest in administering the Bankruptcy Code. Thus the rights of all non-religious creditors to a portion of the bankrupt's estate under neutral laws, were subjugated to the interests of the church, in violation of the Fourteenth Amendment's guarantee of equal protection of the laws.

In the area of child protection, at least one state court has modified the tort law negligence standard to require that the tortfeasor's religious beliefs and practices be considered by the jury. *Lundman v. McKown*, 530 N.W.2d 807 (Minn.App. 1995), *review den., cert. den.* 116 S.Ct. 814. In *Lundman*, a wrongful death tort action was brought against a Christian Scientist and her hired spiritual treatment providers for withholding medical care and allowing her 11-year-old son to die of untreated diabetes. The Minnesota Court of Appeals held that because "an individual's right to religious autonomy is a core ideal of both the state and federal constitutions ... we apply a standard of care taking account of 'good-faith Christian Scientist' beliefs rather than an unqualified 'reasonable person standard.'" *Id.*, at 827-28. Under RFRA the same result is compelled in all courts, because "the religious belief would be burdened by the [tort standard]." *Id.* at 818. The result is that the fundamental constitutional right to life of all children in the custody or care of spiritual treatment providers and the constitutional right to have their disputes adjudicated under religiously neutral principles of law guaranteed by the equal protection and due process clauses of the Fourteenth Amendment, are violated by RFRA.

Because RFRA subjugates the interests of all persons, not just those of government, to religious interests, it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and it is therefore an improper exercise of Congressional power under the ratchet theory of Article 5.

2. RFRA'S LIMITATION ON POWERS OF THE STATE TO ACCOMPLISH A LEGITIMATE STATE PURPOSE TO A SINGLE LEAST RESTRICTIVE MEANS, VIOLATES THE STATE'S RIGHTS UNDER THE TENTH AMENDMENT AND PRINCIPLES OF FEDERALISM, TO ADOPT CUMULATIVE REMEDIES IT MAY DEEM NECESSARY.

Under the federal constitution Congress is limited to its enumerated powers and the states retain their integrity of self-governance under the Tenth Amendment and the federalism principle inherent in the constitution. *New York v. United States*, 505 U.S. 144 (1992). Unless a state intrudes upon an individual right incorporated under the Fourteenth Amendment, or upon pre-emptive Congressional exercise of its powers, a state is free to accomplish its interests by any means consistent with its laws.

With these principles in mind, the states have an intense local interest as *parens patriae* in the protection of its children. The vulnerability and legal incompetence of children, as well as protection of the local fisc, underscore the compelling nature of a state's interest in enacting and enforcing laws which protect and nourish the lives and health of children.

It has long been held that indeed, a state's interest in child protection is so compelling that it does not require strict scrutiny even when the parent's right to free exercise of religion under the First Amendment is burdened. *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *Prince*, the Court upheld the child labor law conviction of a guardian who had required her child to distribute religious tracts on the street against claims that such conduct was religiously required, stating:

> "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death ... Parents may be free to become martyrs themselves, but it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.*, at 167, 170.

In furtherance of this unquestioned interest in child protection, states have enacted a comprehensive scheme to deal with the problem of child endangerment, abuse, neglect, or non-support including criminal penalties, civil tort liability, mandatory reporting, and social service intervention. Because of their intense interest in the welfare of children, states have exercised their judgment that a single remedy is insufficient. This exercise of inherent state authority in an important area of local concern should not be restricted by a federal standard which confines the state to a single "least restrictive" remedy.

Yet RFRA's strict scrutiny standard does exactly that for children who are in the custody of persons whose religious beliefs or practices are contrary to commonly accepted notions of child welfare. The types of religious practices which adversely affect child welfare include reliance on spiritual means for treatment of illness which withholds needed medical care, physical punishment, abuse through exposure to dangerous animals or poison, as well as child sexual practices. The safety of children in schools has also been subjugated under RFRA. See *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

The interest of the states in the support of children is also compelling and has been addressed with a wide panoply of remedies designed to provide the fullest protection both for the individual child as well as the public fisc. The remedies enacted by the state may include a criminal penalty for non-

support, civil child support orders in both support proceedings as well as marriage dissolution, wage withholding and sequestration of property, and the enforcement of those support orders by contempt.

Again, in the case of child support, RFRA confines the state remedy to one "least restrictive means" where the refusal to pay is based upon religious belief. *Hunt v. Hunt,* 648 A.2d 843 (Vt. 1994). In *Hunt* the court held that where the non-supporting father was a member of a church which prohibited support of children who lived outside of the closed religious community, RFRA required that the state show that exercise of the contempt power was the least restrictive means, and dismissed the contempt citation, leaving the state powerless to enforce its order for support. *Id.*, at 854. Such confinement of the state's remedy did not exist prior to RFRA.

Because the interest of the states in child protection is so compelling, it is not subject to RFRA balancing under its Tenth Amendment rights and powers retained under federalism.

III. THE ENACTMENT OF RFRA HAS HAD OTHER UNINTENDED UNCONSTITUTIONAL EFFECTS.

The enactment of RFRA has had serious unintended effects on Congress and the courts.

A. RFRA Has Induced the Enactment Of Other Unconstitutional Legislation by Congress.

From 1987 to 1994 the U.S. Department of Health and Human Services (HHS) ruled some states out of compliance with Child Abuse Prevention and Treatment Act (CAPTA) grant standards because the state's laws gave exemption from a duty to report medical neglect or limited the state's ability to

investigate and order medical care when caretakers withheld medical care on religious grounds. Several churches charged that HHS's efforts were prohibited by RFRA. They claim that state intervention in child neglect does not serve a compelling federal interest and therefore RFRA prohibits the federal government from setting standards applicable to children whose parents raise religious objections to medical care. *The Christian Science Journal*, October, 1994, at 41-42.

These churches claim that prayer is "excellent health care" and that, under RFRA, the government has the burden of proving that medical care is better than prayer before it can require medical care for a sick or injured child. A special counsel for the National Council of Churches has asserted, "The government has to show that there's a compelling reason not to exempt this particular person. So it's not just the general governmental interest ... but its a compelling interest. It's a very high standard." *The Christian Science Journal*, April, 1995, at 48.

In Congressional testimony, a Christian Science spokesman charged that HHS policy under CAPTA violates RFRA: "Not only has HHS not examined the least restrictive means question, they have not proven that their actions advance or better the compelling interest of health care for children. Absolutely no evidence exists showing Christian Science care and treatment to be any less effective for the health of a child than conventional medical treatment." *Philip Davis, Statement to Subcommittee on Children and Families, U.S. Senate Labor and Human Resources Committee*, May 25, 1995.

Under this argument, RFRA requires the states to prove the ineffectiveness of prayer before it can require medical treatment for a sick child whose parents rely exclusively on spiritual treatment for healing disease. That is a virtually impossible burden to meet, and leaves children at risk of death and disability.

In response to RFRA proponents, Congress enacted in 1996 the first religious exemption in federal law from a caretaker's obligations to provide necessities of life for a child: "Nothing in this Act shall be construed as establishing a federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian." P.L. 104-235, § 112.

Thus, RFRA not only overrides state laws and reduces state options for protecting children as argued *supra*, but it has also influenced federal lawmakers to abandon their conditions for participation in CAPTA with respect to one class of children determined on the basis of their parent's religious beliefs. Such disparate treatment based solely upon religious criteria violates the Establishment Clause and Equal Protection Clauses of the Fourteenth Amendment, and was based upon the assumption that RFRA requires it.

B. RFRA Has Unintended Effects On Establishment Clause Standards.

The enactment of RFRA has also skewed other long-standing legal standards under the Establishment Clause even although RFRA explicitly disclaims any such effect.

In *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F.Supp. 1466 (1996), the Court invalidated 15 sections of United States statutes and regulations which granted to Christian Science sanatoria "operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts" complete exemption from all medical healthcare standards under Medicare and Medicaid, on the grounds they violated the Establishment Clause. In reaching that conclusion, the Court employed the Establishment Clause standard from *Larson v. Valente*, 456 U.S. 228 (1982) which requires, in cases where the law facially discriminates among

religions, justification by a compelling government interest and a close tailoring of the classification.

However, in spite of RFRA's explicit provision that it does not affect the Establishment Clause, the Court found that because RFRA's enactment indicated strong Congressional endorsement of religious accommodation, such accommodation of religion was a compelling governmental interest under the *Larson* standard. The Court held that it was only because the exemptions were not narowly tailored that they violated the *Larson* standard. Thus, contrary to what RFRA's proponent's claim, RFRA may have a significant impact on Establishment Clause jurisprudence as an indication of a compelling governmental interest in religious accommodation, thereby justifying facial discrimination among religious sects.

CONCLUSION

Because RFRA dramatically alters the landscape of nearly all Church/State and Church/individual litigation, its effects are not confined to free exercise of religion, and thus Congress has far exceeded its authority under the Constitution.

Respectfully submitted,

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